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report, in proceedings relative to a trust created by deed, charged one trustee with a single item and on the basis thereof reported certain items of credit for one beneficiary, the subsequent cancellation, on appeal, of the charge against the trustee eliminated the beneficiary's right to the items of credit.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 490; Dec. Dig. § 329.* 13 Va.-W. Va. Enc. Dig. 354.]

2. Costs (§ 78*)—Award—Operation—Res Judicata.—A decree entered on a commissioner's report in a suit against trustees, which report made no mention of costs other than to deduct a small amount for unpaid and additional costs to accrue, was not res judicata as to all costs subsequent to the report.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 319-325; Dec. Dig. § 76.* 3 Va.-W. Va. Enc. Dig. 628.]

3. Costs (§ 209*)—Fee Bill—Presumption of Correctness.—Fee bills of the clerk and other officers of the court were presumptively correct; and it was not ground for a refusal to allow such costs that there was no evidence to show that they had not already been paid.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 789; Dec. Dig. § 209.* 11 Va.-W. Va. Enc. Dig. 333.]

4. Appeal and Error (§ 1194*)—Determination—Effect in Lower Court.—Where, on appeal in an action against trustees, it was adjudicated that a certain person's interest in certain of the land had been acquired by one trustee, such person could not, on the case being recommitted to the commissioner, be heard to assert an interest in the proceeds arising from a sale of such land.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4648-4656, 4660; Dec. Dig. § 1194.* 1 Va.-W. Va. Enc. Dig. 646; 14 Va.-W. Va. Enc. Dig. 113; 15 Va.-W. Va. Enc. Dig. 77.]

Appeal from Circuit Court, Rappahannock County.

Action by Mary A. Smith and others against Miller's trustees and others. From the decrees, defendants appeal. Reversed.

H. G. Moffett, of Washington, Va., and *J. A. C. Keith*, of Warrenton, for appellants.

Munford, Hunton, Williams & Anderson, of Richmond, for appellees.

PENN et al. v. TUCKER et al.

March 13, 1913.

[77 S. E. 473]

1. Executors and Administrators (§ 406*)—Sale of Property—Proceeds—Distribution.—Where, during the administration of an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

estate which was indebted to judgment creditors, the court directed a sale of property subject to homestead, and required that the receiver invest the fund for the benefit of the infants during their minority, and that on the termination of the homestead estate the principal should be applied to the judgment, after which the decree was removed from the docket, with leave to reinstate it at any time within three years, the decree was not final; and the principal sum having been deposited in a bank, and remaining until the termination of the homestead without ever having been applied to the judgment, its subsequent disposition was subject to further order of the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1612½; Dec. Dig. § 406.* 8 Va.-W. Va. Enc. Dig. 191; 14 Va.-W. Va. Enc. Dig. 601.]

2. Equity (§ 446*)—Original Bill of Review—Improvident Decree.—Where a decree had been improvidently entered in a partition suit, removing it from the docket before the rights of the parties with respect to a fund on deposit in a bank had been adjusted and the money disposed of, and defendants had never appeared in the litigation, or in any way made demand either against the estate of the decedent, who formerly owned the land, or to the specific fund, and the fund remained an unadministered asset of the estate, to which decedent's widow and children were entitled, but there was no one that could withdraw the same from the bank in which it was deposited without the aid of a court of equity, and the time had passed within which a bill of review could be filed, complainants could obtain relief by means of an original bill in the nature of a bill of review, under the rule that any matter clearly showing that a decree is improper, though not obtained by fraud, collusion, or surprise, may be made the ground for impeaching the decree by an original bill in the nature of a bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1079-1090; Dec. Dig. § 446.* 2 Va.-W. Va. Enc. Dig. 391; 14 Va.-W. Va. Enc. Dig. 154; 15 Va.-W. Va. Enc. Dig. 123.]

Appeal from Circuit Court, Henry County.

Suit by Hunter K. Penn and others against Wesley A. Tucker and others. Decree for defendants, and complainants appeal. Reversed.

Geo. H. Marshall, of Martinsville, for appellants.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.